

Heathrow's third runway: is there a change in the wind?



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15/04/2020



On 27 February 2020, the Court of Appeal ruled that the UK government's Airports National Policy Statement (ANPS), including the approval of the Heathrow expansion, was unlawful because it did not consider the impact of the project on the UK's climate change obligations under the Paris Agreement on Climate Change (*R (Plan B Earth) v Secretary of State for Transport* and linked cases [\[2020\] EWCA Civ 214](#); [\[2020\] PLSCS 31](#)).

The decision follows the Dutch Supreme Court decision in December 2019 in the case of *Urgenda Foundation v State of the Netherlands*, which found that the government of the Netherlands was contravening Articles 2 and 8 of the European Convention on Human Rights – the right to life and the right to private and family life – by failing to provide a more ambitious greenhouse gas reduction target for the end of 2020.

A likely result of these rulings is that greater weight will be given to reducing carbon emissions and other environmental considerations in government decisions, particularly across infrastructure, planning, and areas of increased public scrutiny.

Businesses would be prudent to undertake full audits of the legal robustness of public authorities' decision-making processes on business-critical projects. Similarly, they should ensure they are acting consistently with their own messaging when considering policies on greenhouse gas emissions and other sustainability concerns. With investors, shareholders, employees and customers increasingly climate-conscious, decisions ensuring compliance with environmental policies and objectives are expected to prove beneficial in the long term.

The Heathrow appeal

The Court of Appeal heard several challenges, from local authorities and environmental non-profit organisations, concerning the legality of the process which produced the ANPS, detailing plans for a third runway and increased infrastructure at Heathrow Airport.

The court found that the transport secretary had failed to take into account the Paris Agreement, which seeks to reduce carbon emissions and limit global warming to below 1.5°C to 2°C, and had not followed the department's own procedure as set out in section 5(8) of the Planning Act 2008, which requires that national policy "must... include an explanation of how the policy set out in the statement takes account of government policy relating to the mitigation of, and adaptation to, climate change". The decision to expand Heathrow Airport, then, is unlawful unless and until the transport secretary has taken the UK's climate change obligations, including under the Paris Agreement, into account in making the decision and detailed such considerations.

The UK is currently on track to meet its obligations for the reduction of carbon emissions for the period 2018-2022, but it seems increasingly unlikely that it will achieve the necessary reductions to meet the targets for the 2023-2027 period without significant further policy interventions.

The Court of Appeal was explicit in stating that it has "not decided, and could not decide, that there will be no third runway at Heathrow". It has also not decided that:

- any policy statement supporting the expansion is incompatible with the UK's obligations under the Paris Agreement;
- the transport secretary is obliged to act in accordance with the Paris Agreement; or
- the transport secretary must reach any particular outcome.

Rather, the government should make a second pass at the ANPS, this time taking into account its obligations under the Paris Agreement. A new ANPS and any underlying evidence used to produce it will inevitably be subject to intense scrutiny.

What the ruling means for businesses

The Court of Appeal's ruling clarifies that climate change has to be explicitly considered as part of UK national aviation and infrastructure and development policy more broadly. The court has brought section 5(8) of the Planning Act 2008 to national attention and has identified the Paris Agreement as a consideration under the Climate Change Act 2008. The government will have to specifically consider the climate change ramification of any infrastructure and development policies and plans going forward. The increased focus on climate change policies is already impacting businesses, with non-financial reporting on environmental, social and governance (ESG) metrics increasingly expected from large and sophisticated businesses.

The UK Stewardship Code is expected to be updated this year to place ESG considerations and reporting at the heart of regulated asset management and the revised UK Corporate Governance Code requires premium-listed companies to report on the business purpose and impact on wider society, which will include reporting on environmental impact.

There are many advantages to companies of being climate conscious, including:

- increased understanding of climate-related risks and opportunities, enabling better risk management and strategic planning;
- potential expansion of investor base and improved credit ratings and worthiness;
- better long-term sustainability by moving away from reliance on fossil fuels; and
- better corporate reputation and improved relationship with investors, shareholders and customers which will drive sustainable long-term profit.

The European Commission guidelines on non-financial reporting also set out a number of advantages to non-financial reporting. For businesses to be economically sustainable, it looks as though they will have to be environmentally sustainable as well. Some companies have not only committed to be carbon negative by 2030, but they have gone further and are aiming to remove all historical carbon emissions since they were founded.

The door is now open for other challenges to major infrastructure projects and a proposed challenge to the government's decision to approve the HS2 rail project has already been announced. The government's second Road Investment Strategy – an ambitious £27bn plan announced in the Budget to fund 20 connections to ports and airports, over 100 junctions and 4,000 miles of road – looks likely to come under scrutiny. Client Earth, the climate advocacy group, has lodged a challenge against the decision of the secretary

of state for business, energy and industrial strategy to grant development consent for a power development against the recommendation of the Planning Inspectorate's panel. The crux of that challenge is an alleged failure by the secretary of state to explain how the project "squares with the UK's carbon targets and its Clean Growth Strategy".

This trend seems set to continue: the recent launch of the International Bar Association's Model Statute for Proceedings Challenging Government Failure to Act on Climate Change is intended to remove common legal hurdles for citizens, businesses and non-governmental organisations seeking to compel or challenge government action on climate change.

Businesses may be concerned that the results of the Heathrow case could put London's position as an international centre for business at risk, because it is not able to increase its connectivity with other markets around the world. An alternative view is that if businesses are themselves having to look inwards at their own environmental practices, they might want to do business in a city that is doing the same. Global climate policies and other external factors – such as coronavirus – will continue to make virtual links more popular as an appropriate and cost-effective way to conduct business, limiting the need for business travel and related carbon emissions.

Leading the charge

The Court of Appeal's recent ruling is a clear indication that the government is expected to follow its own legislative provisions requiring consideration of climate concerns when determining its domestic policy.

The recent World Economic Forum's Global Risks Report demonstrates that environmental disasters driven by climate change are the most likely and impactful risk faced by all businesses. With climate consciousness rising, businesses should consider their own carbon emissions and broader sustainability and ESG policies, which are increasingly the target of as much scrutiny as financial data.

Although the November COP26 climate talks in Glasgow have now been postponed to 2021 owing to the Covid-19 pandemic, this ruling marks the UK out as a global leader in the fight against climate change.

The UK's climate commitments

The 2015 Paris Agreement on Climate Change saw every signatory, including the UK, pledge to reduce emissions by 40% from their level in 1990 by 2030. This included a firm commitment to restrict the increase in global temperatures to below 2°C above pre-industrial levels, while pursuing efforts to limit the temperature increase to only 1.5°C.

The UK enacted the Climate Change Act 2008, becoming the first country to introduce long-term, legally binding national legislation to tackle climate change. This Act includes a commitment to reduce carbon emissions by 80% from their level in 1990 by 2050 by a series of five-yearly "carbon budgets" and to develop a climate change adaptation plan. These commitments have been enshrined in UK law, meaning Brexit will not impact the UK's carbon emission obligations.

The UK was also the first major economy to legislate for net zero greenhouse gas emissions by 2050 and has since launched a Net Zero Review to help determine how the UK can maximise economic growth opportunities as it establishes a green economy.

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